IN THE

Supreme Court of the United States

October Term—1949

No. 143

MARINE MAINTENANCE CORPORATION,

Petitioner,

vs.

EDWARD R. McGLYNN, as Trustee in proceedings for reorganization of debtor,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The state of facts in the petition filed in this matter substantially sets forth the factual situation.

The decision below is correct. It turns on the peculiar facts and circumstances of the case which were in effect, found by the District Court and approved by the Circuit Court of Appeals, and does not present a question of general importance. There is no conflict of authority.

It will be noted that although there were four separate appeals considered by the Circuit Court, the petition only involves one. The amount involved is $3,065.08. The District Court in its memorandum filed December 15, 1948 (see Volume I, Appendix pp. 123a and 124a), found as a fact in connection with the second exception which involves $1,340.08:

> "This exception is directed to certain sums paid by the Trustee to one William J. Manning, an employee. It is admitted by the Trustee that these sums were paid to reimburse the said employee for expenses incurred and paid by him in the discharge of his duties. It appears that weekly payments in the total of $1,340.08 were thus paid without supporting vouchers or receipts. This exception will, therefore, be sustained and the Trustee will be surcharged the full amount of this expenditure. This is not to suggest that this expense was not necessarily incurred by the Trustee in the discharge of his duties, but the Court is reluctant to lend its approval to what was obviously a bad accounting practice."

With reference to the third exception, it found,

> "The third exception is directed to rents in the total amount of $1,725.00, for office space occupied by the Debtor during the period of reorganization, but formerly occupied by the Trustee. It is admitted that a monthly rental of $50.00 was paid to Albert Greenfield & Co., for this space, which was apparently released by the Trustee. The only explanation of the Trustee is that no other space was readily available during the years 1944, 1945 and 1946, and we accept this explanation as true because we know that office space was at a premium during this period. The expenditure may have been necessary, but it is our opinion that it should not have been made without first acquainting the Court with the necessity of making it and obtaining the Court's approval. This exception is, therefore, sustained, and the Trustee will be surcharged the amount of $1,725.00."

The William J. Manning referred to in Exception No. 2 and the particulars referred to above, was respondent's chief bookkeeper and accountant from almost the beginning of this proceeding until June, 1945. He had complete supervision over the entire staff of bookkeepers and accountants, which ranged from one to ten in number. It

was necessary for him to confer almost daily with representatives of the F. B. I., which organization made a complete check of debtor's records similar to that conducted under respondent's supervision, and with numerous Field Agents and representatives of the United States Maritime Commission. In the beginning of this proceeding practically all of the records of the debtor were in the possession of the Department of Justice in its New York office and later transferred to the Federal Building in Newark. After the criminal trial and pending the appeal taken from the conviction of the debtor's treasurer the records were impounded by the Court in the Federal Building in Newark. This required almost daily traveling back and forth from Newark to the New York office of the Department of Justice and later to the Federal Building in Newark by some member or members of the respondent's bookkeeping staff. During the trial of the criminal case in Newark it was necessary to have some of the accounting staff located in a hotel in Newark because a great deal of work had to be done early in the morning before the District Court opened and late in the afternoon and evening after the Court had adjourned. Later many trips were necessary to both Philadelphia and Washington by Manning as respondent's representative.

Every week Manning prepared a statement of the cash expenses paid by him in connection with his duties which were submitted to the respondent and approved for payment. Every one of these weekly requisitions was introduced in evidence. It was impossible to obtain supporting vouchers for many of such expenses. Those are the items in Exception No. 2 which were labeled by the debtor exception as "Unsupported according to good accounting practice."

Exception No. 3 deals with an expenditure by respondent for monthly rent of $50.00 for space in his office exclusively used and occupied by persons in his employ as

trustee, or Government representatives who found it necessary to spend considerable time to check debtor's records and to approve claims which were later allowed and paid in the substantial sums set forth in the statement part of this brief.

These monthly payments were made directly to the Renting Agent of the building. At the time of respondent's appointment attempts were made to procure office space but it is a matter of judicial notice that at that particular time office space was almost impossible to procure in Newark. Respondent had some vacant space in his office because one of his associates who used it was in the armed services and it was charged at exactly the same rate per square foot as respondent paid for his entire suite.

Respondent admits that the District Court had the power to review respondent's account as Trustee and to surcharge him if the proper factual situations were indicated by the proofs. See 11 U. S. C. A., Sec. 75, and cases therein cited. Particularly see Note 45, page 343. Also see 11 U. S. C. A., Sec. 641, Note 27 on page 437.

But as was said in the case of *Chappel* v. *First Trust Company of Appleton, Wis.*, in 30 F. Supp. 765 (D. C. Wis., 1940) at page 766:

> "His accounts may be surcharged for any loss that his wrongful conduct may have occasioned."

In re B. A. Montgomery & Son, 17 F. 2d 404 (D. C. Ohio, 1927), at page 405:

> "If in the performance of these duties he violates the law or acts so negligently or carelessly as to inflict loss upon the estate or persons interested therein, he must answer in damages."

See also *Carson, Pirie, Scott & Co.* v. *Turner,* 61 F. 2d 693 (C. C. A. 6th, 1932).

The head note *In re Moorehead Knitting Co.*, 58 F. Supp. 88 (D. C. Pa., 1944) reads:

> "In the absence of proof of unfaithfulness, fraud, fraudulent intent, or loss, no surcharge can be maintained against trustee in corporate reorganization proceeding."

Judge BUFFINGTON in this Circuit said *In re Eberhardt*, 3 F. 2d 990 (C. C. A. 3rd, 1925) at page 991:

> "* * * failure to discern any act or failure to act on the part of the receiver in the premises which is a proper subject of criticism, we are of the opinion that the possibility of surcharge of accountant is too remote for consideration, * * *."

In connection with some of the items in Exception No. 2, it is quite evident that respondent's bookkeeper took advantage of respondent by including alleged disbursements which, apparently, were not made by the bookkeeper. However, respondent exercised due diligence in the employment of this bookkeeper and, therefore, the Court's attention is directed to *Evans* v. *Williams*, 276 F. 650 (C. C. A. 6th, 1921) and *In re Northern Marble Corp.*, 51 F. Supp. 26 (D. C. Del., 1943) which upholds the principle that if the trustee exercised due diligence in the employment of competent employees upon whom he was reasonably entitled to rely, he should not be held responsible for results created by such employees who turned out to be careless or who actually deceived him.

Conclusion

It is respectfully submitted that an examination of the cases cited by petitioner in its brief will disclose that where surcharges were upheld the factual situation involved the person who was surcharged with something more than carelessness or negligence and in most every case there

was some wrongful conduct which amounted to unfaithfulness, fraud, or fraudulent intent, and in each instance a loss to the estate. The conduct of respondent in this case did not amount to unfaithfulness, fraud or fraudulent intent and there was no loss to the estate.

The petition should be denied.

Respectfully submitted,

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